IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC., et al., *Petitioners,*

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., *Respondents*

BRIEF OF CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE

LANDON GERALD DOWDEY
1331 G Street, N. W.
Washington 5, D. C.

T. RABER TAYLOR
Suite 625
American National Bank Building
Denver 2, Colorado

C. JOSEPH DANAHY
44 Court Street
Brooklyn 1, New York

Counsel to Amicus Curiae,
Citizens for Educational Freedom

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

CASES

VIRGINIA STATUTES

Page

TREATISES AND ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC., et al., *Petitioners*,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., *Respondents*

BRIEF OF CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE

In 1964 the basic issue in this case is essentially the same as when it was first here in 1954:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[1]

Then and now, the Commonwealth of Virginia and Prince Edward County undertake to provide educa-

---

[1] *Brown* v. *Board of Education*, 347 U. S. 483, 493.

tional opportunities. Have they made such opportunities available to all on equal terms in Prince Edward County?

A number of theories have been advanced to demonstrate that they have not yet done so.

Petitioners attack the 1959 closing of public schools in Prince Edward County. They attack it either alone or in conjunction with the formation of the Prince Edward School Foundation and 1960 State and County tuition grant and County tax credit plans as an "evasive scheme" condemned by the principles of Cooper v. Aaron, 358 U. S. 1 (R 27-28, 214).

This theory was adopted in part by the District Court. Since "action taken pursuant to certain ordinances would be a circumvention or attempted circumvention" of its prior desegregation order, it enjoined County tuition grants and tax credits "during such time as the public schools of Prince Edward County remain closed." (R 66).

State scholarship grants were not found to be circumventions. On the contrary, the legislation was interpreted as being unavailable "to persons residing in counties that have abandoned public schools." Thus state grants were also enjoined "so long as the public schools of Prince Edward County remain closed." (R 67).

Initially the District Court abstained and reserved its ruling on reopening public schools (R 66-68). Later, noting the irreparable loss that would be sustained by further abstention, the court ordered "that the public schools of Prince Edward County may not be closed to avoid the law of the land as interpreted by the Supreme Court while the Commonwealth of

Virginia permits other public schools to remain open . . .'' (R 86).

In the Court of Appeals, the United States as *amicus curiae* advanced this idea apart from any principle of ''evasion,'' contending that there is a denial of equal protection when the Commonwealth suffers the schools of Prince Edward County to remain closed while schools elsewhere in the State are operated (R 214).

In the final analysis, however, all of these several theories of relief return to the original principle of decision: equality in educational opportunities.

Now as in 1954 the same question must therefore be asked: Are educational opportunities being ''made available to all on equal terms'' in Prince Edward County?

Interest of This Amicus

Citizens for Educational Freedom (CEF) is a national organization dedicated to freedom of choice in education. It was founded in St. Louis, Missouri in 1959. Its current membership is approximately 25,000 distributed throughout all 50 states. Most of these members are organized into 350 local chapters. Its membership is composed mostly of parents and educators. Many races and creeds are represented and the political affiliations of its members are as diverse as their geographical distribution.

CEF files this brief with the consent of all parties.

It has advocated, among other things, tuition grants and tax credits to students, or their parents, who choose to pursue their education in non-public schools. On the negative side: Failure to balance massive support of state-controlled schools with some financial as-

sistance *to the individual,* for use at an independent educational institution of choice, fosters a dangerous state monopoly in education. On the positive side: Placing control of funds in the hands of students or parents with which to make a choice of schools strengthens First Amendment guarantees of freedom of thought and freedom of religion.[2]

CEF is vitally concerned that no discriminatory restrictions be placed on the use of tuition grants or tax credits. No person in the United States should, on the ground of race, color, religion or national origin, be excluded from participation in, or denied the benefits

---

[2] Bernard Iddings Bell, *Crisis in Education,* New York City, McGraw-Hill, 1949.

Virgil C. Blum, Freedom of Choice in Education, New York City, Macmillan, 1958; Revised paper-back edition, Deus Books, 1963.

Leon Dure, "The New Southern Response: Anatomy of Two More Freedoms," The Georgia Review, Vol. XV No. 4 (Winter 1961).

Milton Friedman, "The Role of Government in Education," in Economics and The Public Interest, ed. by Robert A. Solo, Rutgers University Press.

Robert M. Hutchins, On Education, a pamphlet published in 1963 by the Fund For the Republic; see also by the same author "A Liberal Calls for Aid to Church Schools," Saturday Evening Post, June 8, 1963; and "The Future of the Wall," an address to the Law School of the University of Chicago, January 9, 1963.

T. Robert Ingram, Editor, *Schools Weighed in the Balance,* St. Thomas Press.

Wilber G. Katz, "The Freedom to Believe," *Atlantic,* 192 (Oct. 1953).

Louis Marshall, Amicus Brief of the American Jewish Congress in Meyer v. Nebraska, 262 U. S. 390 (1923); The Oregon School Cases: Complete Record (1925), 615.

Proctor Thomson, "Educational News and Editorial Comment," *The School Review* LXIII (April 1955)

of, any educational program providing government financial assistance.

Tuition grant and tax credit programs should, and usually do, operate to assure that no such discrimina-tions are possible. But in rare instances such programs may be so burdened with restrictions on their use as to make any "choice" illusory. Certainly parents and students should not be required to surrender primary and Constitutional rights as a condition for sharing in welfare benefits.

CEF advocates "A Fair Share for Every Child." When government establishes an educational opportu-nity, it should be granted to all children on equal terms.

CEF believes this principle of equality in educational opportunities is violated by certain very specific and concrete discriminations in the administration of the tuition grant-tax credit programs here involved.

Propositions To Which This Brief Is Addressed

It is the position of this amicus that the Prince Edward County tuition grants and tax credits *on their face* make unconstitutional discriminations on religious and geographic grounds, and that *in practice* they result in racial discrimination.

The Virginia grants *on their face* make a religious discrimination only, but in the circumstances prevailing in Prince Edward County they operate *in practice* to discriminate geographically and racially also.

This amicus urges that due process and equal protection demand that where the state has undertaken

to provide educational opportunities through a tuition grant or tax credit system, or both, such an educational opportunity "is a right which must be made available to all on equal terms." The classifications in the tuition grant and tax credit legislation affecting Prince Edward County educational opportunities are invidiously discriminatory in the several respects noted. Therefore they condition access to the educational benefit on the student's surrendering his Constitutional right to equal protection of the laws against discrimination and the free exercise of religion.

The Important Context of Massive Resistance

This amicus will not undertake to recite the long tragic history of this case both in and out of court. Such part of that history as the Court is not already acquainted with may be found in the soon to be published report of the Virginia Advisory Committee of the United States Commission on Civil Rights, written by Dr. J. Kenneth Morland. Nevertheless, in view of the somewhat diffuse remark of the majority in the Circuit Court below indicating that Virginia's program of tuition grants "has a lengthy history," it might be well to point out that, for all practical purposes, the whole subject of tuition grants originated in Virginia's massive resistance program.

Less than two weeks after this court directed that desegregation of Prince Edward County public schools should proceed "with all deliberate speed," the Prince Edward School Foundation was established. This court's opinion was dated May 31, 1955. The foundation charter was dated June 9, 1955. The purpose was to provide schooling for white children in the county

if public schools were closed to avoid implementing this court's desegregation directive (O. R. 159-166).[3]

The very day this court's opinion was announced, the County Board of Supervisors voted unanimously to cut off all funds for the operation of public schools.[4]

Progress toward making the large scale operation of the Prince Edward School Foundation, and similar "private" institutions economically viable substitutes for public primary and secondary schools was temporarily interrupted a few months later. The Supreme Court of Appeals of Virginia held tuition grants for orphans of servicemen killed in World Wars I and II violated § 141 of the Virginia Constitution, which, it said, prohibited any appropriation which would benefit any school other than a public school. The court added, gratuitously, that notwithstanding Everson v. Board of Education, 330 U. S. 1, the appropriation was unconstitutional on the further ground that the tuition grants might be used at "sectarian" schools.[5]

The State Constitution was quickly amended to permit tuition grants for use at private "nonsectarian" schools.[6]

Massive resistance legislation enacted September 29, at the 1956 Extra Session of the General Assembly

---

[3] Refers to Original Record transcript of testimony lodged in this court but not printed.

[4] See Benjamin Muse, *Virginia's Massive Resistance*, Indiana University Press, 1961, pp. 12-14, 161.

[5] *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 (dec'd. November 7, 1955)

[6] § 141 Amendment approved January 9, 1956.

provided for the closing of any public school threatened with desegregation in consequence of a court order.

Tuition grants became operative only upon the closing of a public school to avoid desegregation. Chapter 56 provided in § 1:

> "Whenever the amounts . . . appropriated . . . for the maintenance of a [county, city or town] elementary public school system shall be withheld as prescribed by law, the amount so withheld shall be available . . . for the furtherance of the elementary education of the children [of such county, city or town] in nonsectarian private schools as hereafter provided."

Section 2 made the same provision with respect to secondary schools. Chapter 57 authorized tax levies for furtherance of education "in non-sectarian private schools" if there were no levy for public schools. Chapter 58 authorized budgeting of such tuition grants, and state regulation of the manner in which they were to be paid. Chapter 62 facilitated expenditure by local authorities of such tuition grants. Chapter 68 provided for the school closing, and Chapter 70 provided for pupil placement.

The 1956 massive resistance legislation was eventually held unconstitutional in almost every aspect.[7] It was repealed in 1959. The same year a tuition grant program similar to the 1960 legislation presently involved was enacted.[8]

---

[7] *James* v. *Almond,* 170 F. Supp. 331 (1959) dism'd. 359 U. S. 1006; *Harrison* v. *Day,* 200 Va. 429, 106 S. E. 2d 636 (1959).

[8] See note in current supplement to §§ of Code of Virginia, 1950 Ed., preceding § 22-115.29.

This legislation, despite a substantially different outlook, cannot be considered apart from its directly evasive antecedents. However much we might have hoped otherwise, it had its genesis in massive resistance, and this psychology has clearly governed its operation in Prince Edward County.

. . . Reinstated by Prince Edward County Ordinances

The 1959-1960 tuition grant legislation is found in § 22-115.29 et seq. of the Code of Virginia, 1950 Ed. and Current Annual Supplement.

§ 22.115.29 declares it to be in the public interest to provide "scholarships" for education of children "in nonsectarian, private schools in or outside and in public schools located outside, the locality where the child resides." It authorizes levying local taxes for such purpose. § 22-115.30 provides state grants and §§ 22-115.31, 22-115.32, and 22-115.36 authorize local grants which combined with state grants shall amount to not less than $250 annually per child for primary school and $275 for secondary school.

The Board of Supervisors enacted two implementing ordinances July 18, 1960. The first, authorizing the tuition grants, requires an oath to obtain them which includes the following language:

> "(e) that each child on whose behalf the application is filed will be enrolled in either a private, nonsectarian elementary or secondary school within the County of Prince Edward or a public school within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for." (R 109)

The second ordinance provided a tax credit and included the following language:

> "(1) Contributions made by any person, association, firm, corporation or other taxpayer of the

> County of Prince Edward, Virginia to a non-profit nonsectarian private school located within said County . . . may be deducted from the real and personal property taxes due the County . . . subject to the limitations set forth in this ordinance [which limits the credit to 25 per cent of the tax bill, among other things].
>
> "(2) . . . the term "private school' shall mean only those non-profit, nonsectarian private elementary and secondary schools either in operation during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding . . . which schools are located in the County . . . and which offer or will offer . . . a course of systematic educational instruction of not less than one hundred eighty days duration or the substantial equivalent thereof." (R 111-112).

Points of difference between the ordinances and the directly evasive 1956 massive resistance legislation are

(1) accidental features such as amounts, administrative detail, and descriptive language;

(2) tuition grants are supplemented by tax credits; and

(3) the operation of these programs is not on their face related to the closing of public schools to avoid desegregation.

It is the view of this amicus that all these differences are either formal, or immaterial, since in actual operation, the necessary intention and result are the same.

The State grants obviously do not follow this pattern. There are no State tax credits. The State imposes no geographical restraint on the use of tuition

grants. They are not designed to operate where public schools are closed (R 63-64), and there is no evidence that they have been used to avoid desegregation outside of Prince Edward County (R 221).

The Important Context of Existing Educational Resources and Opportunities

Private "nonsectarian" primary and secondary schools represent at best a trifling segment of Virginia schools. In 1955-56, for example, non-public primary and secondary schools operating in Virginia enrolled only 39,550 pupils. This enrollment was 5.0 per cent of the total enrollment in all schools.[9]

But of all private schools, not more than a handful were "non-sectarian." Standard lists of private schools show only 16 in Virginia which do not state a church affiliation. Such handbooks do not even list, for want of space, the parochial or purely denominational schools in that State.[10] These naturally enough account for the largest number of schools and the overwhelming bulk of the private school population.[11]

---

[9] Statistics of State School Systems 1955-56, HEW, Table 44, pp. 114-115. The same publication for subsequent years shows rising numbers and percentages of non-public enrollment. In 1961-62 the total non-public enrollment was 65,000.

[10] Sargent's Handbook of Private Schools, an Annual Descriptive Survey of Independent Education, Boston, 1963 and prior years.

[11] Statistics of State School Systems 1955-56 reports in Table 43, pp. 112-113 the number of Catholic elementary and secondary schools in Virginia. Comparison with total non-public enrollment in Table 44, pp. 114-115 shows Catholic elementary schools alone account for 5/6 of the total non-public elementary enrollment (25, 421/30, 050). Almost one-third of the secondary non-public enrollment was Catholic also (2,844/9,500). It is apparent from

Practically all religiously affiliated schools are desegregated. All those of major denominations are.[12]

Thus, the tuition grant-tax credit legislation was not to facilitate education at any kind of independent school heretofore known to exist in Virginia in significant number. The existent, traditional and known private school structure was with only minor exceptions "sectarian" and desegregated.

In Prince Edward County, the only kind of school at which the tuition grant-tax credit legislation could be utilized was one like the Prince Edward School Foundation, founded for the express purpose of affording a segregated education when public schools were closed to avoid desegregation.[13]

This is precisely the way it worked. Mrs. Cheatham, "in charge of the applications for educational grants for the children of Prince Edward County," testified that she had received 1,363 applications for tuition grants and had approved 1,363 (R 184, 189, 195).

> Q. Am I correct that of that 1,363 all but 5 were for education at the Prince Edward School Foundation?
>
> A. Yes, sir. (R 189).

* * *

Sargent's that most of the listed secondary schools are not Catholic but Episcopal, and that there are significant schools affiliated with the Baptist, Methodist, and Reformed Churches. Statistics of Non-public Schools, 1960-61 shows 2/3 had a stated religious affiliation (10,111/15,595). No comparable study is available of the much more numerous and religiously affiliated primary schools except that noted above.

[12] Muse, *op. cit.*, p. 3.

[13] Non-public Secondary Schools, Directory 1960-1961, HEW, lists Prince Edward Academy, operated by the Foundation, as the only private secondary school of any kind whatsoever in Prince Edward County. There is no listing of primary schools.

Q. What about the 5?

A. The 5 that went to public schools located within the State of Virginia (R 195).

These five were the only Negro applicants (R 60).

In point of fact, therefore, the only subsidized choices available to school age children in Prince Edward County were:

(1) The local, "private, non-sectarian," segregated substitute for public schools closed to avoid desegregation.

(2) a public school outside the county.

Thus, in actual operation, we have the classic pattern of the massive resistance program with its clear-cut racial, religious, and geographic discrimination. This is the way it operated in Prince Edward County. It could not in the circumstances have operated otherwise.

. . . leaves no real freedom of choice

Naturally enough, the 1800 Negro children cast into the void by the closing of the public schools excited the concern of their parents and of many charitable organizations and individuals. The Negro citizens organized the Prince Edward County Christian Association. They operated training centers attended by some 441 children throughout the year. Although they could hardly be considered "schools" in the ordinary sense, attempts were made to instruct the children as best could be done with the limited personnel and material resources available (OR 347, 340-343, 409-410, 419, 430, 435).

Nevertheless, within the broad interpretation adopted by the Board of Supervisors, and their anxiety to authorize such grants, Prince Edward County Christian Council training centers would undoubtedly come within their "good faith" educational effort definition of "school."

Mrs. Cheatham was asked:

> Q. And all you required was that the child be enrolled and that you satisfy yourself in an honest bona fide effort was being made for a responsible person to educate the child?
>
> A. Yes, sir. (R 192-193)
>
> * * *
>
> Q. So that in the administration of this ordinance the policy of the Board of Supervisors as applied by you was to make this money available to any person, guardian, or parent who had this child in a course of instruction training in a good-faith, honest effort to try to do something to help that child educationally?
>
> A. That is correct.
>
> Q. And this money was available and it was the policy of the Board to make it available to people in that situation regardless of whether they had a formal school, or formal building, or formal grades, or that the teachers were accredited by the State Department, or that their surroundings were safe and sanitary—it was an effort to help people who in good faith were undertaking to serve the need of the county to educate children of any race?
>
> A. That is right. (R 194)

However flexible the concept of "school" the "Christian" identification of the Council operating the training centers disqualified anyone from obtaining a tuition grant to use there, or a tax credit for

any donation made. The court found, "these centers do not meet the requirements for either State or County tuition grants." (R 59)

Yet it is quite obvious that the Prince Edward Christian Council might easily have changed its name so as to make its "students" eligible for tuition grants and its donors eligible for tax credits. It might easily overlook the fact that one of its largest donors is the American Friends Service Committee (OR 366). It could benefit all of these people—students and donors —by merely surrendering its convictions. But it is plain that the Christian Council, its supporters, students, and donors will not sell their convictions in exchange for a tuition grant or tax credit. Neither, apparently, will most of the other traditional Virginia private schools, students, or benefactors.

Just as parents are restricted in their choice to non-religious schools, so the same economic burden attaches if they seek private education outside the County. But if there was to be any choice of private schools at all, it would have to be outside the County.

While a tuition grant could not be used to attend a private school outside the county, it could not be used at a public school unless it was outside the County. Thus on the face of the ordinance and as a necessary result of closing the public schools there was a clear-cut geographical discrimination.

These several religious and geographical discriminations led inexorably to the racial discrimination. In Prince Edward County there was no choice.

The only purpose served by the tuition grants was to tempt the people of Prince Edward County to surrender their moral, religious and legal principles.

Reasons why many people would have nothing to do with tuition grants is perhaps best stated by Reverend Griffin (OR 364):

> "Because as an individual I just think it is the wrong thing to do anything that would set up a situation to get around, circumvent, disobey, or not comply with the Supreme Court order of 1954 which says in essence that public schools should be desegregated."

In the view of these people, and this amicus, acceptance of Prince Edward County tuition grants and tax credits involves the surrender of moral, religious and legal principle.

Summary of Conclusions

§ 22-115.29 of the Virginia Code declares, "It is the policy of the Commonwealth to encourage the education of all the children of Virginia." The Supreme Court of Appeals of Virginia has stated that the legislative purpose is to grant "state and local scholarships without reference to race or creed."[14] Yet in Prince Edward County such tuition grants are in fact available only upon surrender of the following constitutional rights:

(1) Equal protection of the laws against religious discrimination, and the free exercise of religion, because *on the face* of the *State statute* and the *County*

---

[14] 133 S. E. 2d 565, at 579.

ordinance benefits are only available if used at a school having no religious affiliation.[15]

(2) Equal protection of the laws against geographic discrimination,[16] because,

(a) *On the face* of the *County ordinance* recipients are entitled to benefits only if they attend a public school outside the County;

(b) *on the face* of the *County ordinance* recipients are entitled to benefits only if they attend a private school in the County;

(c) by *necessary operation* of the *County ordinance* because there are no public schools open within the County.

(d) by *necessary operation* of the *County ordinance* because there is no choice of private schools within the County.

---

[15] Sherbert v. Verner, 374 U.S. 398, In re Jenison, U.S. , No. 238, October Term 1963, decided October 14, 1963. Free exercise of religion is inseparable from its companion intellectual freedom, without which there can be little if any worthwhile education at all. In Meyer v. Nebraska, 262 U.S. 390, restrictions on the teaching of German in a Lutheran School was held violative of due process. Louis Marshall observed, "If the children of the country are to be educated in accordance with an undeviating rule of uniformity and by a single method, then eventually our nation would consist of mechanical Robots and standardized Babbitts." Brief Amicus on Behalf of the American Jewish Committee, in Meyer. See Oregon School Cases: Complete Record 732 (1925), p. 615. Another integrally related constitutional right is that of a parent to educate his child recognized in Pierce v. Society of Sisters, 268 U.S. 510. All of these rights are directly involved in the selection of a school. For convenience they are treated generically as involving free exercise of religion.

[16] Gomillion v. Lightfoot, 364 U.S. 339; Baker v. Carr, 369 U.S. 186 and see James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959) appeal dismissed 359 U.S. 1006.

(3) Equal protection of the laws against racial discrimination, because *in consequence* of the foregoing religious and geographic discriminations the benefits are available only to recipients who attend a "private nonsectarian" substitute for public schools closed to avoid desegregation.[17]

The essential kinship of all racial, religious, and regional prejudice is a matter of daily observance, but few men are prepared to relate the invidious discrimination they suffer with the prudent discrimination they practice. This case is unique in illustrating all three and at the same time showing their interdependence.[18]

---

[17] The most celebrated example of this approach is the case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), where the Court reviewed a city ordinance which required the securing of permits by persons operating laundries in wooden buildings. The court noted that the law exclusively affected Orientals since they owned virtually all laundries housed in wooden buildings while the Caucasian laundrymen used other kinds of structures. Because of this, and despite the fact that the ordinance was innocent on its face, (as this one is not!) it was condemned by the Court in these words (118 U.S. at 373-74):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the protection of the Constitution."

[18] In Schware v. Board of Bar Examiners, 353 U.S. 232, 239 this Court observed:

> "Obviously, an applicant could not be excluded merely because he was a Republican, or a Negro, or a member of a particular church."

The only thing we lack here is a Republican.

The Importance of Unfettered Choice in Education

These invidious discriminations, especially in their inter-relationship, demonstrate the threat to freedom involved wherever the principle of equality in educational opportunities is ignored in even the slightest degree. It should be remembered that we are not dealing here with parks or swimming pools but with the very mind and spirit of man.

John Stuart Mill, in his essay "On Liberty," reviews the whole problem of tuition grants and public education in Chapter V. Its balance and completeness justifies its quotation at length:

"If the government would make up its mind to require for every child a good education, it might save itself the trouble of providing one. It might leave to parents to obtain the education where and how they please, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them. The objections which are urged with reason against State education do not apply to the enforcement of education by the State, but to the State's taking upon itself to direct that education; which is a totally different thing. That the whole or any large part of the education of the people should be in State hands, I go as far as any one in depreciating. All that has been said of the importance of individuality of chartcter, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education.

"A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them

is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation; in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

"An education established and controlled by the State should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence.

"Unless, indeed, when society in general is in so backward a state that it could not or would not provide for itself any proper institutions of education unless the government undertook the task: then, indeed, the government may, as the less of two great evils, take upon itself the business of schools and universities, as it may that of joint stock companies, when private enterprise, in a shape fitted for undertaking great works of industry, does not exist in the country. But in general, if the country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able and willing to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense."[19]

Tuition grant programs remove the economic burden on choice of school. Within the past month the

---

[19]Brittanica Great Books, Vol. 43, p. 318.

American people have adopted the 24th Amendment to the Constitution, which, in substance, removes an economic burden on the Constitutional right to vote. In addition, both this Court and the House of Representatives have taken measures to remove the economic burden which deprives indigent defendants to their right to transcripts and to counsel in criminal proceedings in the Federal Courts.

The Virginia tuition grants therefore represent an important step in fostering intellectual freedom. By removing some of the economic burdens on the choice of a school, they encourage educational diversity. Such grants may do much to counteract our tendencies towards social rigidity and conformity.

But considering the delicacy and importance of the subject matter involved, it is all the more imperative that strict distributive justice be observed in administration of tuition grants. Respect for persons—always a corrupting factor—is particularly dangerous here. If everyone is subsidized in the choice of a school *except* he who chooses a school with a religious affiliation; *except* he who would cross the county line; *except* this person or that, we open a whole Pandora's box of prejudices.

CONCLUSION

In *Communications Assn.* v. *Douds*, 339 U. S. 382, 417 Mr. Justice Frankfurter said that the government "may withhold all sorts of facilities for a better life but if it affords them, it cannot make them available in an arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities."

In *Sherbert* v. *Verner*, 374 U. S. 398, it was said:

> ". . . no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.'"

Finally when this case was here in 1954 this Court said:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

This principle should be implemented by continuing the injunction against State and County tuition grants and tax credits in Prince Edward County until such time as all racial, religious, and regional restrictions thereon are removed.

LANDON GERALD DOWDEY
1331 G Street, N. W.
Washington 5, D. C.

T. RABER TAYLOR
Suite 625
American National Bank Building
Denver 2, Colorado

C. JOSEPH DANAHY
44 Court Street
Brooklyn 1, New York

Counsel to Citizens for Educational Freedom, Amicus Curiae.